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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-924

LEWIS T. KENT,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner is attempting to raise questions in this Court which were never presented to any Ohio Court. It is an appellate rule of long standing that matters which have not been raised and litigated in the lower courts may not be raised in the appellate court. Further, petitioner has stated no jurisdictional basis for this Court to consider his second Question Presented. For these reasons a writ should not be issued in this matter.

OPINIONS BELOW

The petition of the petitioner correctly sets forth the opinions of the Ohio Courts.

JURISDICTION

Petitioner has claimed jurisdiction pursuant to 28 U.S.C. 1257 (3). That statute reads in pertinent part as follows:

> "Section 1257. State Courts; appeal; certiorari.
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . ."

This statute does give the Court jurisdiction over the first question petitioner raises, which challenges the constitutionality of an Ohio Statute. However, it does not give this Court jurisdiction to consider the second question presented by petitioner. That question, no matter how petitioner frames it, says in essence that the trial court abused its discretion in sentencing the defendant to a term of one to five years on a receiving stolen goods charge. 28 U.S.C. 1257 (3) does not give this Court jurisdiction to consider the second question presented by petitioner. It is submitted that this Court does not have jurisdiction to consider this question.

QUESTIONS PRESENTED

1. WHETHER THE SUPREME COURT WILL ISSUE A WRIT OF CERTIORARI TO A STATE COURT IN ORDER TO CONSIDER ISSUES WHICH WERE NEVER PRESENTED TO THE STATE COURT.
2. WHETHER RULE 11A and RULE 11B OF THE OHIO RULES OF CRIMINAL PROCEDURE, WHICH ALLOW A DEFENDANT TO VOLUNTARILY ENTER ANY ONE OF THREE POSSIBLE PLEAS, ARE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
3. WHETHER A STATE TRIAL COURT ABUSES ITS DISCRETION IN SENTENCING A DEFENDANT TO A TERM OF ONE TO FIVE YEARS IN PRISON ON A CONVICTION FOR RECEIVING STOLEN PROPERTY.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, federal statutes, and state rules which are involved are as follows, and are contained in Appendix A herein.

United States Constitution, Fifth Amendment
United States Constitution, Eighth Amendment
28 U.S.C. Section 1257 (3)
Ohio Criminal Rule 11 A and Rule 11 B

STATEMENT OF THE CASE

Defendant-petitioner was indicted by the Hamilton County, Ohio, Grand Jury on April 14, 1975. The indictment was numbered B-751323 and charged petitioner with two counts of Receiving Stolen Property. Defendant was arraigned on April 16, 1975, and entered a plea of not guilty and was released on bond.

On February 10, 1976, the defendant entered a plea of no contest to each count of the indictment and a finding of Guilty as to each count was entered. After a probation investigation was conducted a sentencing hearing was held. Sentences of one to five years were imposed on each count and were made to run concurrently. Defendants conviction was affirmed by the Ohio First District Court of Appeals on May 18, 1977. Defendants appeal to the Ohio Supreme Court was dismissed on September 9, 1977, and that Court denied a motion for rehearing on September 29, 1977.

REASONS FOR DENYING WRIT

I

THE UNITED STATES SUPREME COURT WILL NOT ISSUE A WRIT OF CERTIORARI TO A STATE COURT TO CONSIDER ISSUES WHICH WERE NEVER PRESENTED TO OR CONSIDERED BY THE STATE COURT.

Neither of the two questions presented by this petitioner were presented to the trial court, to the Ohio Court of Appeals or to the Ohio Supreme Court. These questions are now being raised for the first time in the United States Supreme Court. It is a well established rule of appellate procedure in Ohio that issues that are not preserved in the lower Courts cannot be raised on appeal. This rule applies as well to constitutional issues. *State* v. *Childs*, 14 O.S. 2d 56 (1968) and *State* v. *Phillips*, 27 O.S. 2d 294 (1971). The United States Supreme Court respects this rule of appellate procedure and will not issue a writ to consider questions which were not presented to the state courts. In *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447 (1936) the United States Supreme Court stated as follows:

> "As the highest court of the state declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them." (citations omitted)

As petitioner raised neither of the issues he is currently presenting in the lower courts, he is precluded from raising them in this Court.

II

RULE 11(A) AND RULE 11(B) OF THE OHIO RULES OF CRIMINAL PROCEDURE, WHICH ALLOW A DEFENDANT TO VOLUNTARILY ENTER ANY ONE OF THE THREE POSSIBLE PLEAS, ARE NOT VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Defendant contends that the Ohio Criminal Rules, with regard to a plea of no contest, are constitutionally defective. In Ohio a no contest plea is an admission of the truth of the facts alleged in the indictments, but is not an admission of guilt. The essential significance of the no contest plea is that the admission of facts may not be used against the defendant in any subsequent civil or criminal proceeding. This is the purpose of the no contest plea. Defendant may also enter pleas' of guilty or of not guilty. The choice of which plea to enter is a voluntary matter for the defendant.

Defendant contends in his brief that the entry of a no-contest plea prevents him from telling his side of the story. Defendant cites to the cases of *McKenna* v. *Ellis,* 280 F. 2d 592 and *Irvin* v. *Dowd,* 366 U.S. 717 (1961) as standing for the proposition that a defendant in a criminal trial is entitled to a fair trial. This proposition is undoubtedly correct. However, the important point here is that defendant has voluntarily entered a plea of no-contest, thereby waiving his right to trial. Defendant has suffered no deprivation of Due Process because of this procedure.

III

A TRIAL COURT DOES NOT ABUSE ITS DISCRETION IN SENTENCING A CRIMINAL DEFENDANT TO A TERM OF ONE TO FIVE YEARS ON A CONVICTION ON TWO COUNTS OF RECEIVING STOLEN PROPERTY.

It is the position of respondent that this Court does not have jurisdiction to consider this question presented by petitioner. The reasons therefore are set out in the jurisdictional statement and will not be repeated. However, if the court should care to consider this issue it is the feeling of respondent that the claim of cruel and unusual punishment raised by petitioner is facially devoid of merit.

Petitioner was convicted of two counts of Receiving Stolen Property and was sentenced to a term of one to five years in prison. This sentence is well within the limits provided by Ohio law and is not even the maximum penalty permitted. It is hard to believe that petitioner would seriously advance a claim of cruel and unusual punishment based on these facts.

An examination of the record in this matter reveals that petitioner, himself the owner of an optical company, was the kingpin in a theft ring specializing in optical burglaries in the Midwest in 1973 and 1974. Petitioner Kent was in contact with known burglars and thieves. Petitioner would come to these men and advise them of his need for certain types of expensive optical equipment. These men would then go out and burglarize optical outlets and steal machines, reselling them to petitioner for a fraction of true value.

On August 2, 1973, a burglary at an optical office in Columbus, Ohio, resulted in a loss of $30,000 in optical

equipment. The thieves sold some of the material, including a 'diamond-edger' (a cutting and grinding tool) to petitioner for about $400. The true value was in excess of $2000. Petitioner had purchased numerous items of stolen property in the past from these same burglars.

On August 25, 1974, an optical laboratory in Roanoke, Virginia, was burglarized and equipment valued at $14,500 was stolen. The thieves sold part of this merchandise, a diamond edger worth in excess of $2000 to petitioner for about $400. This equipment, along with the previously mentioned edger, was recovered while in petitioner's possession. Investigation revealed that petitioner was extensively involved in stolen optical equipment sales for a period of some years. In effect petitioner was operating a stolen property and theft ring which spread its' tentacles into several midwestern states.

In view of the factual background involved here petitioner is fortunate to be facing only a mild term in a state prison. Petitioner could very easily have been charged with various federal crimes and be facing a much stiffer term in a federal prison.

A punishment is said to be 'cruel and unusual' when it is grossly disproportionate to the offense and shocks the conscience of the community. *Weems* v. *United States,* 217 U.S. 349 (1910). The term of one to five years clearly does not offend this standard and is certainly not an abuse of discretion by the trial court, which is the real question presented by petitioner on these facts.

CONCLUSION

Respondent respectfully submits that the petition for a Writ of Certiorari should be denied for the following reasons:

1. This Court does not have jurisdiction to consider the second question presented by petitioner.
2. Petitioner has raised neither of the questions he now presents in the State Courts. Therefore this Court will not consider them.
3. Petitioner has not demonstrated that Ohio Criminal Rules 11 (A) and 11 (B) are violative of the Due Process Clause.
4. A sentence of one to five years for two counts of Receiving Stolen Property does not amount to cruel and unusual punishment.

For these reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty or property without due process of law; . . ."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

28 U.S.C. Section 1257 (3) :

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By Writ of Certiorari . . . where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege or immunity is specifically set up or claimed under the constitution . . ."

Ohio Criminal Rule 11:

" (A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty, or with the consent of the court, no contest.

. . .

(B) (2) The plea of no contest is not an admission of the defendants guilt, but is an admission of the truth of the facts alleged in the indictment . . . ."